



Hate Speech Regulation in Post-Communist Countries: Migrant Crises in the Czech and Slovak Republics

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Abstract

In 2015, the migrant crises in Europe showed that countries that have less experience with immigrants are also the less welcoming. Lack of proper application of hate speech laws and common use of political hate speech in the Czech and Slovak Republics have further promoted prejudice and intolerance towards minorities. In the absence of a universal definition of hate speech, I interpret incitement to hatred in three different but complementary ways: incitement to violence; incitement to discrimination; and incitement to denial of human dignity. This generational model is also applied to interpret the Czech and Slovak case law to explore the possibilities for outlawing hate speech that targets migrants and to decide on which 'legal goods' a society should protect in the twenty-first century.

Keywords

Hate speech; political speech; immigration; Slovakia; Czech Republic.

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Introduction

The beginning of 2015 saw an unprecedented migrant afflux into Europe and subsequent political agenda setting. According to the United Nations High Commissioner for Refugees (UNHCR 2017), the war in Syria and Iraq, conflict and instability in Afghanistan and Eritrea, and growing inequality worldwide, all led to the creation of a record number of people seeking refuge and sanctuary in Europe. In the dangerous journey crossing the Mediterranean Sea, thousands have lost their lives intensifying the humanitarian crisis and challenging the European capacity to provide proper technical, legal and human response (Collett 2017).

Since January of the same year, Europe became a frequent target of terrorists' attacks, sponsored by Al-Qaeda and ISIS/ISIL (Islamic State of Iraq and the Levant), both of which claim to follow the Islamic religion. This has intensified religious animosity towards Muslims in Europe. As a result, European public opinion has been heavily concerned with security and has seen a massive movement against welcoming Middle Eastern refugees (Goodwin and Raines 2017). European populist and right-wing politicians have used this situation to fuel hatred towards migrants and Muslims, claiming to protect native populations from them (Fundamental Rights Agency 2016).

As a result, migrants coming to Europe have not been seen as victims of war in need of assistance, but mainly as threats to security and job opportunities (European Commission 2016). Lack of solidarity not only towards vulnerable migrants but also by adopting a uniform approach with border European states has mainly come from Central and European States (CEE) that refuse to share the burden within the European Union. For example, in 2015, Slovakia manifested its disapproval of 'migrant quotas' by filing a lawsuit against the European Commission. The case was later lost but politicians gained popularity with this gesture (Von Der Burchard and Barigazzi 2015). Since its beginning, the migration crisis has been used for populist political means.

Political debate about migrants coming to Europe is vital and the exercise of free speech in this regard is crucial in allowing all opinions be heard regarding these public affairs. However, the right to free speech is not absolute (Barendt 2009). In addition, not all opinions are equally relevant in a democratic space. Hate speech does not contribute to useful discussion but instead plays with the public's emotions by creating a dichotomy between their basic security needs and the need to avoid an identity crisis amongst welcoming populations. In the Czech and Slovak Republics, this threat to identity is particularly pronounced in political discourse about migrants. Politicians have contrasted migrants' origins, languages, religions and cultures with European traditions and questioned the capacity and willingness of the former to integrate into European society (Mesežnikov and Gyárfášová 2017).

Hatred fueled speech against migrants in the Czech and Slovak Republics is not perceived as illegal speech or speech deserving any kind of social rejection. There are two main reasons for this. Firstly, hate speech cases in the Czech and Slovak Republics are seldom brought to the courts. They are seen as extremist crimes, which alone represent only one per cent of all committed crimes (Pejchal-Striskova 2016). Thus, public and political intolerance towards ethnic, national, sexual or other minorities is tolerated even when it incites violence. Second, the Czech and Slovak national legal frameworks focus more on outlawing extremism, which is a more political than legal way of conceptualizing the problem. Speaking about migrants, even in a hateful manner, is considered to be an important political issue and thus protected speech. In this context, the absence of a clear international definition or threshold criteria on the legal definition of hate speech is a barrier to consistent judicial interpretation in hate speech cases and to addressing the problem itself. Achieving an adequate definition of hate speech in CEE states requires an appreciation of the different generational changes that are evident in legal understandings of hate speech. In this article, I propose that understandings of hate speech in the CEE region have followed a generational path that reflects a change in the 'legal goods' under protection in hate

speech regulation. I apply this framework to Czech and Slovak cases in particular. This research is mainly based on an analysis of international and national case law.

Political hate speech towards migrants

Most extremist groups in the CEE share far-right political views and hatred towards minorities. They draw on nationalist rhetoric to promote their racist and populist ideologies (Mudde 2005). In particular, their narratives often feature romantic views of nationalism, whereby they see themselves as part of an elected group of persons that will protect others. With the complex outcomes of globalization, they have adopted a stronger voice by arguing that traditional political means have been exhausted and more radical policies are needed in order to protect the original populations of each country. While extremists have been traditionally known for these views and attitudes, with the new wave of migrants, this kind of rhetoric has now become a part of the traditional political discourse (McDowell 2016). By appealing to negative emotions—mainly fear—extremist groups are surely hoping to incite further hatred towards migrants.

Before the migrant crisis, followers of extreme-right movements were usually skinheads or supporters of neo-Nazi ideology who would commit acts of violence, for example, during sporting events (Milo 2005). With the recent ‘normalization’ of hatred in political discourse (George 2016), the risk now is that larger parts of the population will be attracted to these same ideas. As globalization continues to pose a danger to the comfortable standard of living that has been achieved by the middle class in the CEE region, such as in the Czech and Slovak Republics, members of this class have become particularly anxious about the prospect of losing their social and economic status (Vašečka 2009). Anti-migrant views have gained currency amongst this class not because they believe in far-right ideologues but, rather, because they are fearful of losing their social standing.

Mesežnikov (2016) analyzed the discourse of all political parties in Slovakia during 2015-2016 and found repetitive messages from all ends of the political spectrum. These were focused around two main issues: security and national identity. The most common political slogans were ‘we will protect you’ and ‘we shield Slovakia’ (Mesežnikov 2016: 118). Politicians claimed incompatibility with ‘other cultures, religions, mainly Islam with the Christianity and European traditions’ (Mesežnikov 2016: 146-147). For example, the President of the Czech Republic, has referred to refugees as ‘an organized invasion’. During the same period, conspiracy theories and hoaxes on migrants have spread in online media, promoting negative stereotypes and hatred (Veselková 2017).

The challenges of holding politicians accountable for incitement to hatred are twofold. Firstly, political speech is more heavily protected than any other type of speech in the Czech and Slovak Republics due to its historical absence (Jäger and Molek 2007). Secondly, the prosecution of hate speech in the CEE region is scarce and has been successful only in extreme cases. Nevertheless, in its recent report on extremism, the Ministry Interior of the Czech Republic (2015) affirmed that politicians have influenced public opinion by spreading false information and prejudice about migrants and Islam. The report also observed that, by accepting hate speech as a means of doing ordinary politics, the threshold of what is publicly and legally accepted was pushed further out. Extremists feel encouraged to express their intolerance by such political statements as they fail to see any incentive to change their minds or actions. This is apparent in the example of a young offender from the North of Slovakia who published an advertisement online offering to kill an immigrant for €25. He was given a suspended sentence for inciting hatred. However, he continued to publish *Facebook* profile messages denying the Holocaust and defaming Jews. For these latter offences, he was sentenced to ten months in prison for Holocaust denial and supporting extreme political ideologies and regimes but, interestingly, not because of the incitement to hatred (Slovak Supreme Court 22T/70/2016).

In this climate of intolerance, extreme feelings have now become more common among ordinary people (Fundamental Rights Agency 2016). Politicians have used the migrant crisis to frame themselves as guardians of safety and national identity. By labeling migrants as terrorists instead of human beings in need of aid, they exaggerate the dangers migrants present. Hoffer (1951) has observed that hatred is a unifying factor in mass movements, capable of pulling together people with different social backgrounds and economic interests. Certainly, hatred has been used in this way in past political campaigns in Slovakia to gain support: for example, the Slovak National Party has a history of defaming Hungarians (Mesežnikov 2009). However, in the context of the current migrant crisis, the threshold for political hate speech has been pushed to the extreme.

Hate speech regulation in former communist countries is part of larger constitutional, penal and civil law regulations enacted by several public policies. Historically, hate speech has been linked to extremism, both extremist speech and extremist behavior that aimed at changing political systems (Černý 2008). For example, during the totalitarian communist regime in Czechoslovakia, criticism towards the regime was perceived as sedition, which was, at the same time, related to subversive speech. In other words, extremist speech against the government was characterized in a way that closely aligned it with hate speech. For Guiora (2014: 2), extremism was an ‘ideology far outside the political center of a society’. Using legal and political frameworks of extremism to tackle hate speech raises a fundamental question: what public good is protected by hate speech regulation in a democratic society?

In spite of political sanctions of incitement to hatred, there are legal frameworks in both the Czech and Slovak Republics that outlaw incitement to hatred in different ways and that could possibly be used to sanction perpetrators. However, the application of these laws is rare and interpretation of the provisions even less abundant. To begin to understand the lack of will in the Czech and Slovak Republics to address hate speech through the law, the different ways in which it has been understood both during and post-communism needs to be recognised. In the following sections I offer a generational perspective on hate speech that looks at how understandings of hate speech have evolved in these nations.

Three generational models of hate speech

The international regulation of hate speech has already been heavily analyzed (see, for example, Bratza and Casadevall 2012; Farrior 1996; Mendel 2012; Showalter 2016; Weber 2009). The main challenge in democratic societies has been to balance the right to freedom of speech with the right to protection from hate speech, including the need to achieve proportionality when sanctions are imposed. Yet, balancing rights is always contextual. Internationally agreed-upon standards can only help to guide the application of the rules at national levels. Hate speech lacks a consensual international definition because its meaning is inherently contextual. Hate speech laws, judicial interpretation and social sensitivity evolve over time and according to the changing political environment (Herz and Molnar 2012). Despite these challenges, I argue that hate speech can be defined by focusing on the ‘legal goods’ that international standards aim to protect. Puig (2008) defines legal goods as goods and interests that deserve the protection of (criminal) law because they are socially important and of value for individuals. With this in mind, I identify three generations, or shifts, in the way that hate speech has been conceptualized, particularly in terms of the legal goods said to be under protection (Pejchal and Brayson 2016). This generational approach allows an analysis of which ‘legal goods’ are considered worthy of protection and, therefore, warrant limitations on free speech. Also, it helps create a better appreciation of how the concept of hate speech has evolved over time in response to changing standards. It is important to note, however, that the generational approach I offer here does not suggest that there is a hierarchy among different hate speech definitions but, rather, that they are complementary systems that need to be understood if progress is to be made towards better regulation of hate speech in post-communist countries such as the Czech and Slovak Republics. To develop this generational approach, I have focused on how the core element of hate speech—

incitement—has been interpreted in three different ways: incitement to violence; incitement to discrimination; and incitement to denial of human dignity.

Hate speech as incitement to violence

Grounded in international human rights treaties and their interpretation by the European Court of Human Rights (ECtHR) and treaty body experts, the first generation of hate speech concepts are linked to incitement to violence. Both the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD art. 4) and the *International Covenant on Civil and Political Rights* (ICCPR art. 20.2) ban incitement to violence. In contexts where violence jeopardizes public order, the physical integrity of individuals is considered to be the most precious public good worthy of legal protection. Therefore, speech that incites disruption to public order or attacks individuals because of their membership of a minority warrants state intervention.

A typical case of racist hate speech that involved incitement to violence is a Norwegian case that came before the Committee on the Elimination of Racial Discrimination (CERD). In 2005, in a march to commemorate the Nazi leader Rudolf Hess, Mr Sjolie, leader of the neo-Nazi extremist Bootboys group, spoke about accepting and encouraging violent attacks on Jews and paid homage to their mass extermination during World War II (*The Jewish Community of Oslo and Others v Norway* (CERD/C/67/D/30/2003)). In particular, the declaration that the group would follow in the Nazi's footsteps and fight for their beliefs had to be understood as an acceptance of and incitement to violent acts against Jews. The commemoration march was frightening for the Jewish community and the incitement to violence soon became evident. Several violent incidents took place, including the murder by stabbing of a 15-year-old boy who was the son of a Ghanaian man and a Norwegian woman. Three members of the Bootboys were later charged and convicted by the Norwegian courts in connection with his death; one was found guilty of murder with aggravating circumstances because of the racist motive of the attack. CERD stated that there was a causal link between the hate speech made by Mr Sjolie and serious violent racist acts that followed (*The Jewish Community of Oslo and Others v Norway*, para. 10.4 (CERD/C/67/D/30/2003)).

Examples where hate speech has incited violence are also evident in the Czech and Slovak Republics (Organization for Security and Co-operation in Europe (OSCE) 2015a, 2015b). Here, the most common circumstances are also the commemorations of important Nazi events. Usually members of a far-right movement or supporters of such ideology gather together during a public demonstration during which they incite violence against Jews and other minorities. Often, events end with the attacking of Roma or other vulnerable minority members (European Commission against Racism and Intolerance (ECRI) 2014, 2015; European Roma Right Centre 2012). Thus, incitement to violence during these rallies converts to the commission of violence. This was also apparent in the case of 'battle for Janov' incident in the Czech Republic (see *Spiegel Online* 2008; Velinger 2008) when incitement to violence turned into actual violence towards Roma people (Mareš 2012).

Sometimes, this kind of violence can be resolved by the criminal justice system because incitement to violence crosses the threshold which allows the state to intervene and cancel a demonstration in these nations (Mareš 2011). The trigger point can be when demonstrators start calling for violent actions either through the distribution of racist pamphlets that 'call for an action' or spontaneously by shouting 'let's clean our Republic from parasites' or 'wipe-out the unadaptable' (Jamborová 2009; Výborný and Mareš 2013a). According to Výborný and Mareš (2013b), however, such intervention is often too late because the violence, either against individuals or towards private or public property, has already started when the police decide to intervene.

In the Czech Republic, the most well-known contemporary case of hate motivated violence occurred in 2009. After a commemoration of the 120th anniversary Hitler's birth, a group of Neo-Nazi youngsters attacked a Roma settlement. They threw Molotov cocktails at houses, causing substantial damage and life-threatening conditions for three adults while one two-year old girl had 80 per cent of her body burnt. Criminal charges were laid and the offenders were sentenced to 20 to 24 years under hate crime law, including attempted murder (Czech High Court in Olomouc, 6 To 19/2011). Later, the Constitutional judges considered an appeal against these sentences but refused the claims (Czech Constitutional Court, No. IV. ÚS 1418/12). In doing so, they took into account the events before the attack, including calls for violence, and the offenders' 'sympathy for extremist, neo-Nazi movement and their public incitement to hatred and violence to minority groups'. Notably, in other Supreme Court cases, Czech judges have affirmed that not all skinhead movements do incite violence or hatred and a case-by-case analysis is required (Czech Supreme Court, 5 Tdo 563/2004). In the Czech and Slovak context, the ideological foundation of many right-wing extremist groups is racism (Herczeg 2008).

Hate motivated violence is one of the most significant human rights problems in Slovakia (OSCE 2015a). According to civil society organizations, there is, on average, one hate motivated attack per month (Open Society Foundation 2014). However, Slovak institutions often fail to properly investigate bias motivated violence, prompting victims to seek remedies at the international level, either at the ECtHR or the United Nations Treaty Body Committees. The most well-known cases concern victims of Roma origin (see *Adam v Slovakia* (ECtHR No. 68066/12); *Koky and Others v Slovakia* (ECtHR No. 13624/03; *Koptova v Slovakia* (CERD/C/57/D/13/1998); *Lacko v Slovakia* (CERD/C/59/D/11/1998))). An additional problem with racially motivated violence in Slovakia is the fact that often those who should protect vulnerable minorities commit crimes against them. In particular, when police raids on Roma settlements are carried out, nobody is held accountable for injuries and the damage the police cause (Office of the Slovak Ombudsman 2015).

It would seem appropriate, therefore, to actively prosecute incitement to violence in the Slovak Republic. Contrary to its absence in the *Czech Penal Code*, incitement to violence is codified in the Slovak Republic, though this was done only in the most recent reforms that entered into force in January 2017. At the time, these penal reforms emphasized that these provisions were essential to better address hate motivated violence, spectator violence and extremist incidents. It is important to emphasize that, in the *Criminal Procedure Code of the Slovak Republic* (*Slovak Penal Code*), hate motivated conduct is regulated by a dozen different offences known by the umbrella term 'Crimes of Extremism'. However, the Slovak judiciary has been wary of applying any of the 'extremist' offences to hate motivated violence. Perhaps this is because the Article 424 provision prescribes 'public incitement to violence or hatred' together, and thus fuses two different consequences of hate motivated behavior: violence and hatred. This wording makes it difficult for the judiciary to distinguish between incidents that invite violence and incidents that incite hatred: many incidents do both. The lack of judicial interpretation of Article 424 makes it challenging, in turn, to know how this law is to be applied on the ground.

Despite the limited case law, the circumstances of a typical case in the Slovak Republic appear to be similar to the Czech cases: a group of extremists shout 'gypsies to the gas, you deserve flame, Sieg Heil and Heil Hitler' (District Court Zvolen, 4T/28/2012). In some cases, offenders have cried 'gypsies must be eradicated' and have then attacked a Roma-looking person causing injuries (District Court Bratislava, 1Z 16/00). In another case, an offender had previously attacked Roma in 1998 and again in 2001 when, with other like-minded persons, he threw Molotov cocktails in a house where a Roma family lived while saying 'let's kill the dirty black faces'. They then beat the family with baseball bats. They injured nine and caused death to one person. Racial bias was recognized by the court in this case, including the fact that the offender had links to an extremist group. The offender was sentenced to seven years in prison, which is quantitatively less when compared to other similar Czech cases (District Court Žilina, 9 Co 357/2010; Constitutional Court Decision II. ÚS 424/2012-69).

Hate crimes or racially motivated attacks are a growing phenomenon in many nations (Iganski 2011). It is easier to justify interventions into the right to freedom of expression when such interventions are specifically aimed at guarding against hate speech that incites violence, because violence threatens both physical integrity and general welfare. However, this nexus between hate speech and violence is not always obvious. The ECtHR relies on national assessments of the threat involved and leaves a margin of appreciation for national judges to make determinations about such threats (Goldmann and Sonnen 2016). Thus, the court has no direct role in investigating the consequences of speech in terms of provoking violence. However, the preservation of public order is a legitimate goal under the *European Convention on Human Rights*, meaning that limitations on free speech can be justified on this ground. For example, other nations, such as France, have recognized the need to ban strong anti-immigration and anti-Muslim expressions on the grounds that such speech poses serious threats to public order (*Soulas and Others v France* (ECtHR No. 15948/03)). It appears, therefore, that the 'legal good' being protected under such an approach is the preservation of public order, and freedom from violence, more than freedom from racism.

Hate speech as incitement to discrimination

The second generational approach in the conceptualization of hate speech involves speech that incites discrimination. All international treaties enshrine the principle of non-discrimination and establish legitimate limits on other rights, including freedom of expression, in order to protect the rights of others from discrimination. Showalter (2016: 379) argues that restrictions on freedom of expression are justified as a means of protecting 'the right to live free from discrimination'. The question then arises as to whether prohibiting hate speech is a necessary and proportionate means of pursuing the legitimate right of others to be free from discrimination. The ECtHR is 'conscious of the vital importance of combating racial discrimination in all its forms and manifestation'. (*Jersild v Denmark* (ECtHR No. 15890/89, para. 30)). Also, the court has noted that:

... racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment.
Timishev v Russia (ECtHR Nos. 55762/00 and 55974/00)

Indeed, the protection of minorities is one of the cornerstones for the Council of Europe's work. When analyzing cases that come before the ECtHR, the Strasbourg judiciary does not rely solely on its own jurisdiction but also cites larger international instruments that protect human rights, such as ICERD.

CERD has dealt with speech inciting discrimination on several occasions, including in three Slovak cases (*Koptova v Slovakia* (CERD/C/57/D/13/1998); *Lacko v Slovakia* (CERD/C/59/D/11/1998); *L.R. et al. v Slovakia* (CERD/C/66/D/31/2003)). In all of these cases, the individuals discriminated against were members of the Roma community. The speech inciting discrimination involved access to services such as restaurants or bars and housing or property. The speech was said to create a general climate of hatred that incited a denial of the enjoyment of these rights. A relationship between hateful statements and acts of discrimination or violence was observed in all three cases. However, it is worth noting that, for victims, such discrimination is often experienced as a denial of their right to dignity, meaning that claims are often based on this denial as well (a point I return to in the next section).

All of the leading cases dealt with by the UN Human Rights Committee (HRC) have involved the dissemination of opinions based on hatred of the Jewish community (*Faurisson v France* (CCPR/C/58/D/550/1993); *J.R.T. and the W.G. Party Canada* (CCPR/C/18/D/104/1981); *Ross v*

Canada (CCPR/C/70/D/736/1997); *Zundel v Canada* (CCPR/C/78/D/953/2000)). Strikingly, the Committee adopted a relatively militant approach towards the protection of democracy in these cases (Cavanaugh and Edel 2016) by rejecting claims of racial or national superiority contained within Nazi and/or fascist ideology. In these cases, the protection of a community as a whole from discrimination and racism was justified on the grounds that these same 'legal goods' were violated in human rights atrocities in the recent past. In other words, the courts arrived at the conclusion that not banning discrimination and racism is intrinsically linked to the abuse of human dignity, equality, and the enjoyment of the rights of others (Callamard 2010).

In this sense, it can be concluded that the main objective of the HRC in regards to protection from hate speech is the protection of communities from a 'poison environment' (*Faurisson v France* (CCPR/C/58/D/550/1993)). In this way, the HRC has determined that Holocaust denial warrants restrictions on free speech. If anti-Semitic speech is not banned, society effectively allows the diffusion of discriminatory and offensive statements that attack not only the Jewish community but also undermine principles of peaceful social coexistence. Punishment of such expression represents not only a moral statement of social values but also an expression of solidarity with the targets of hate speech (Mendel 2012).

Incitement to discrimination is now indirectly prohibited in the Czech and Slovak Republics where penal norms have evolved to better recognize discriminatory practices. Since 2017, penal codes in these Republics outlaw 'incitement to restriction of the rights and freedoms' (Art. 356 of the *Czech Penal Code* and Art. 424 of the *Slovak Penal Code*) which, arguably, can be applied to the incitement to discrimination. To date, there is no case law interpreting the meaning or application of these provisions. Also, both penal codes contain provisions that ban apartheid, discrimination, and segregation on the grounds of race, ethnicity, religion, nationality and, in the Czech case, also class (Art. 402 of the *Czech Penal Code* and Art. 424a of the *Slovak Penal Code*). The penal bans on discrimination on the basis of race or nation were introduced to ensure the protection of one primary constitutional value: equality.

Nonetheless, before these reforms, prohibitions on hateful calls for restriction on the rights of others were still regulated but under different penal provisions. For example, in 2010, the Czech Constitutional Court interpreted membership in neo-Nazi groups as a form of support that is aimed at the 'restriction of the rights of others'. In this context of publishing and distributing neo-Nazi materials, the court interpreted hate speech as 'the evil that the democratic rule of law must ban even at the expense of the right to freedom of expression' (Czech Constitutional Court Decision IV. ÚS. 2011/10). This decision confirmed the 'militant' Czech understanding of democracy as something that must be protected even if it involves restrictions on freedom of expression (Knob 2011).

In 2015, the Slovak courts similarly decided that the following forms of speech constituted incitement to hatred: 'let's ban Hungarian political activities in Slovakia'; or 'There are too many Gypsies for the Slovak budget. I don't want to kill them all, there must be legislative changes: No benefits for those that are not contributing to the system other than by breeding children with their relatives! No right to vote for analphabets and non-tax payers'. This decision was justified on the grounds that 'such expression are directed at the restriction of the right to vote, right to privacy and inviolability of dwelling, right to individual freedom and human dignity because of the membership in a national or ethnic minority' (Regional Court Banská Bystrica, 3To/133/2016).

In these cases, the Czech and Slovak courts have acknowledged that speech that incites restrictions on rights and/or discrimination attacks the equal political worth of all members of society. In other words, in this generation of legal responses to hate crime, the 'legal goods' under protection by the state is freedom from the 'poison environment' of discrimination. It is significant, however, that freedom from discrimination is also entwined with the question of

human dignity in these legal pronouncements. This leads me to the third generational approach in the conceptualization of hate speech.

Hate speech as incitement to denial of human dignity

The third and most challenging interpretation of hate speech is speech that simply incites denial of the essential character of humanity: dignity. If human dignity is a legal good worthy of defense, limitations to speech are justifiable (Waldron 2012). Perrone (2014) suggests that the need to protect public morality—one of the possible restrictions in free speech outlined in Article 10.2 of the *European Convention on Human Rights*—can be linked to human dignity and, as such, offers a justification for imposing restrictions on hate speech. He also identifies human dignity as a concept that changes its meaning depending on the context of each case that comes before the ECtHR. He found two different meanings in the ECtHR case law: cases where human dignity was interpreted as self-autonomy; and those where it was interpreted as a relational claim. As Arendt recognized, dignity is ‘a political concept that originated within the interrelations of human beings in the public realm’ (Macready 2016). It is this latter interpretation of dignity—as a relation between people—that Perrone suggests could provide the basis for interpreting incitement to hatred as illegal hate speech.

In hate speech case law appearing before the ECtHR, human dignity has been mentioned mainly in decisions regarding Holocaust denial. Such denial is said to constitute an attack on victims’ memories of the complete abrogation of human dignity, with the intent to humiliate them (Lobba 2015). The cases of Holocaust denial have been decided under the application of Article 17: protection of the values of the *European Convention on Human Rights*. It can be presumed, therefore, that the protection of human dignity of victims of Holocaust represents a core value of the Convention. Garibian (2008) compares the effects of the genocide with its denial: ‘human dignity as well as solidarity and equality of human beings are ravaged by the execution of genocide’ (2007: 486). There is a clear interest in outlawing expressions denying this genocide in order to protect the ‘legal goods’ of dignity.

With regards to the protection of migrants’ dignity in particular, CERD found a violation of Article 4 of the ICERD in a 2013 case when a German cultural journal, *Lettre Internationale*, published an interview with Thilo Sarrazin, the former Finance Senator of Berlin and member of the Board of Directors of the German Central Bank. The article was titled ‘Class instead of Mass: From the Capital City of Social Services to the Metropolis of the Elite’. In this interview, Sarrazin expressed derogatory and discriminatory beliefs about social ‘lower classes’, which are ‘not productive’ and would have to ‘disappear over time’ to create a city of the ‘elite’ (*TBB-Turkish Union in Berlin/Brandenburg v Germany*, para. 2.1 (CERD/C/82/D/48/2010)); a perspective which was also evident in the title of a book he was working on at the time, *Germany is Self-Destructing*. Sarrazin’s interview broke taboos against expressing such views in relation to integration and immigration policy. Encouragingly, the CERD argued that Sarrazin’s comments demonstrated his belief in racial superiority which, in turn, was a denial of respect to other human beings (*TBB-Turkish Union in Berlin/Brandenburg v Germany* (CERD/C/82/D/48/2010)). This example demonstrates the importance of the work of the CERD as a guardian of human dignity (Thornberry 2005) indifferent to ‘race, color, descent or national or ethnic origin’. In its latest General Comment No. 35 on Article 4, CERD interpreted ‘racist hate speech as a form of other-directed speech which rejects the core human rights principles of human dignity and equality and seeks to degrade the standing of individuals and groups in the estimation of society’ (CERD (2013)). This corresponds to Waldron’s (2012) vision of human dignity as a *sine qua non* for equal enjoyment of rights for all. Therefore, enshrining human dignity as a legal good and protecting it from hate speech should be a priority for diverse societies of the twenty-first century.

International ‘hard law’ of this nature is supported by ‘soft law’ norms. The value of soft law ‘lies on the moral and political level’ (Olivier 2002: 290), making it equally important when looking at

how different generational interpretations of hate speech have arisen in the context of regulation. The use of soft law in the human rights domain has had a crucial role in a posterior adoption of hard law. The best-known example is the *Universal Declaration of Human Rights*. Two of the numerous norms regarding the political and philosophical regulation of hate speech require special attention: the *Rabat Plan of Action* (RPA) adopted within the United Nations debate (RPA 2012); and the *General Policy Recommendation No. 15 on Combating Hate Speech* (GPR No. 15) from the Council of Europe (ECRI 2016).

Perhaps the most valued contribution to the RPA (2012) is the 'six-part' threshold test that should be applied by courts when dealing with incitement to hatred cases. This test includes analysis of: context, speaker, intent, content, extent and magnitude of the expression; and likelihood or probability of harm occurring. The objective of the RPA is to ensure the correct application of hate speech laws by judges. However, assistance to victims, which includes minorities and vulnerable groups, represents a core element of the right to remedy under the RPA. The RPA emphasizes that, where possible, different sanctions should be imposed to address the needs of victims, including criminal, civil and administrative sanctions (Parmar 2014).

The GPR No. 15 (ECRI 2016) represents the most up-to-date and authoritative account on hate speech including definition and policies for the elimination of hate speech. It builds on previous activities by the ECRI, ECtHR judgments, other Council of Europe instruments, Camden Principles on the Freedom of Expression and Equality, the RPA and other relevant international hard and soft law. It defines hate speech as:

... the advocacy, promotion or incitement of the denigration, hatred or vilification of a person or group of persons, as well any harassment, insult, negative stereotyping, stigmatization or threat of such person or persons and any justification of all these forms of expression—that is based on a non-exhaustive list of personal characteristics or status that includes 'race', colour, language, religion or belief, nationality or national or ethnic origin, as well as descent, age, disability, sex, gender, gender identity and sexual orientation. (ECRI 2016: para. 9)

This definition is innovative in various ways. First, it includes the term 'advocacy' as active, intentional support, which is comparable to the term 'spread' used in the Council of Europe (1997) Recommendation No. R (97) 20 on hate speech. Second, incitement is not only linked to hatred but also to denigration and vilification. Both terms are interpreted in the context of abuse towards persons on the basis of their membership of a particular group. Third, the list of protected characteristics is comparatively long: it includes ten grounds and it is non-exhaustive. Together, the definitional concepts of harassment, insult, negative stereotyping, stigmatization and threats as constitutive elements of hate speech can be seen as a violation of human dignity. Thus, verbal violence has twofold results. Firstly, the internalization of insults by victims leads to individual emotional distress and negative psychological status because it attacks the inherent characteristic(s) of an individual (Delgado 1982: 140). Secondly, hate speech undermines collective dignity in the sense that it denigrates members of a particular vulnerable group and their standing in society which, in turn, broadens social stratification (Waldron 2012: 106).

In this way, these concepts replace the concepts of violence or discrimination that are found in other generations of hate speech definition. In other words, the harm of hate speech is perceived as 'undermining self-respect of the members of vulnerable groups, damaging cohesion and inciting others to commit acts of violence, intimidation, hostility or discrimination' (ECRI 2016: para. 22).

This is a European understanding of the justifications for regulating hate speech that responds to a peculiarly militant or protective model of democracy (Capoccia 2013). On the one hand, liberal-oriented critics could say that the full application of this provision would have a chilling effect on

free speech because of its breadth. On the other hand, it is its very breadth that allows authorities in individual nations to have a margin of appreciation in the manner they adopt measures on combating hate speech. What is distinctive and powerful about this definition is its attempt to protect the 'legal good' of human dignity. In effect, it is the quintessential example of the third generation in the definition of hate speech in Europe.

Although not directly on the question of hate speech, there is one significant decision from the Slovak Regional Court on the centrality of human dignity to democracy in the Slovak Republic. In this ruling, the segregation of Roma pupils in schools was outlawed on the grounds that the practice was considered highly discriminatory in its targeting of one ethnic minority (Regional Court Prešov 20Co/126/2012). The court found that the creation of 'Roma only classes' came at the expense of 'human dignity which is understood as the primary requirement for enjoyment of human rights'. The court also held that that 'Questions related to human dignity are linked to the quality of the person as a member of humankind ... only by protecting undeniable human dignity can a person thrive as a member of a society'. Importantly, the protection of public interest was interpreted by the court as necessary for building an inclusive society, contrary to the plaintiff's claim that the practice of segregation was necessary to protect the 'white' population. Citing two Czech constitutional decisions and a number of international human rights judgements, this ruling established a precedent for understanding discriminatory treatment as a violation of human dignity.

While human dignity has not been so far extensively used as a justification for hate speech laws, a compelling precedent has nonetheless now been established in the Czech and Slovak Republics. Hate crimes, including hate speech, are motivated by social prejudice (Herczeg 2012). They are a danger to social cohesion. Hate speech also poses a threat to human dignity in the sense that it disempowers individuals and groups of minorities to take part in the democratic processes (Waldron 2012: 109-110). The state has a responsibility to address this form of subjugation by empowering minorities to feel that they are valued members of society on the one hand, and by banning and punishing abuse of freedom of expression on the other. One of the roles of a state in the twenty-first century is to ensure the existence of a 'dignitary society': that is, one in which the dignity of all members of the community is respected (Kysela 2014). I dare to conclude that there is a growing understanding among intellectuals that the denial of dignity is a core component of how incitement to hatred should be understood and why it deserves punishment, not only in the legal sphere but also in political and social domains.

Concluding remarks

To understand state tolerance of hate speech directed towards migrants in the CEE, it is important to explain changes in the interpretation of hate speech at the pan-European level as well as regional particularities. The Czech and Slovak understandings of hate speech have evolved within the broader regulation of extremism but may now evolve in different directions given the recent amendments of penal laws and court interpretation. Similar to international interpretations, hate speech in this region was first understood mainly as incitement to violence, later as incitement to discrimination, and finally as a denial of human dignity. In the context of the former Czechoslovakia, hate speech has been interpreted as a form of extremism linked to violence and hate crime. Only recently have reforms made it possible to punish hate speech that incites discrimination by hampering the enjoyment of human rights. This is the model of generational change that I have sought to present in this article. Much of this change has been driven by shifts in the kinds of 'legal goods' seen worthy of state protection. While such change is inevitable, it is time to develop greater consensus on which public goods require legal protection and justify state intervention. Only then can the adoption of a specific hate speech law follow. However, the complexity of political, legal and social changes in the post-communist countries is well known. Although protection of human dignity is legally enshrined, its judicial or political defense is still reluctant. When the inherent value of each human being is recognized independent of origin,

religion or skin color by the important actors within society—including politicians—hate speech towards migrants will be less tolerated and, hopefully, also less frequent.

With the migrant crisis and hateful responses from politicians, politics in the CEE region have become more nationalistic. Smith (2003) argues that nationalism is a crisis of identity. In the CEE region, such identity is still fragile and the use of hate speech shows that the identity of the majority is constructed at the expense of the identity of minorities. Constructing strong democratic institutions, capitalist economies and global relations is a challenging endeavor for a population that has witnessed several radical changes during their lifetimes. Central European politicians should promote a strong inclusive democracy that protects people independent of their real or perceived 'otherness' and, above all, they should abstain from promoting extremism and hate speech. In this context, the main responsibility of government is, as stated by the Director of the International Organization for Migration, to help people understand that 'migration is a human reality to be managed responsibly not an issue to be solved' (Swing 2015).

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¹ The views expressed herein are those of author and do not necessarily reflect the view of the United Nations.

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